

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFTON E. SMITH,

Defendant-Appellant.

UNPUBLISHED

March 25, 2003

No. 238200

Wayne Circuit Court

LC No. 01-001762

Before: Schuette P.J. and Sawyer and Wilder, JJ

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83 and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of eleven to twenty years for the assault conviction, to be preceded by a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Facts

In his trial testimony, the victim identified defendant as a man he knew as “Bo.” He indicated that, prior to July 2000, he had seen defendant many times around his neighborhood but had not talked to him. According to the victim’s testimony, he was a friend of Richard Talley and he had grown up with a Byron Rice. The victim stated that many times he saw friends of Byron Rice with defendant. The victim explained that he had testified previously as a witness called by the defense, in a case in which Richard Talley was accused of murdering Byron Rice. In his testimony in that case, the victim “just told about the incidents that Byron Rice and Richard Talley had, the fights and the shootouts, all they [sic] little incidents they had.” The victim said that Talley was acquitted.¹ The victim testified that, on the day of Talley’s acquittal, which he believed was July 19, 2000, he was standing in front of his house at about 11:00 p.m. with two friends. The victim said that defendant walked up and said “who is George” (which is the victim’s first name). The victim testified that, after this, defendant pulled out a revolver with his right hand and pointed it at the victim’s head. The victim said he grabbed defendant’s right wrist and that defendant “just turn[ed] the gun like this into my arm and shot

¹ The parties stipulated that the victim was a defense witness in the *Talley* case and that, on July 19, 2000, Talley was acquitted of second-degree murder in that case, but convicted of felony-firearm.

it.” Then, the victim pushed defendant away and ran to the side of his father’s truck up the driveway. While the victim was running, he “heard like five more” shots and could see that defendant was shooting with the gun pointed at the victim. The victim said that “when all the shots ran out he [defendant] was just standing there shooting, and the gun was just going click, click, click” and then defendant walked away.

The victim’s father testified that the victim lived with him on July 19, 2000. He indicated that, at some time after 11:00 p.m. on that date, he heard gunshots. After this, there was a knock on the door and, when he went to the door, his son was there and had been shot. The victim’s father said that the victim told him that he was shot by someone named “Bo.” A police officer also testified that he responded to a report that a man had been shot at the pertinent location on July 19, 2000, and that the man who had been shot told him that “Bo Smith” had shot him.

Defendant’s mother testified that, on July 19, 2000, she had a “little party” to celebrate her late husband’s birthday and that defendant attended the party. While her testimony appeared to be somewhat unclear, she seemed to indicate that the party may still have been going on until at least 11:30 p.m. Defendant’s sister testified that she saw defendant at the party “all day” and more specifically that defendant was in the house playing spades at about 11:30 p.m. Nakiya Broadnak, who said that she was a friend of defendant’s family, testified that she was at the party on July 19, 2000, and replied affirmatively when asked if she saw defendant there “about 10:30, 11:00 o’clock, 11:30 that evening.” She indicated that defendant was in the living room playing cards with her and two other people.

II. Assault With Intent to Commit Murder

Defendant first argues that there was insufficient evidence to support a finding that he committed an assault with intent to murder. We disagree. In reviewing the sufficiency of the evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide if any rational factfinder could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). The elements of assault with intent to murder are: (1) an assault; (2) with an actual intent to kill; and, (3) if successfully completed, the intended killing would constitute murder. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). Defendant contends that there was insufficient evidence that he had an intent to kill the victim. The intent to kill may be proven by inference from the evidence. *Id.* at 658. As set forth above, the victim testified that defendant pointed a gun at his head and thereafter shot him during their ensuing struggle. Further, the victim testified that defendant fired multiple gunshots at him after he ran away from defendant. Given the obvious deadly potential of a bullet fired from a gun, a reasonable factfinder considering this evidence in a light most favorable to the prosecution could conclude beyond a reasonable doubt that defendant acted with an intent to kill the victim.² Defendant further argues

² We note that defendant does not argue that, if there was sufficient evidence of an intent to kill, that there was not sufficient evidence that the attempted killing, if successful, would have constituted murder. Further, there is no indication from the evidence of any arguable justification, excuse, or mitigating factor that would have prevented an intentional killing of the victim during the incident from having constituted murder.

that the prosecution failed to rebut the testimony of his alibi witnesses. However, the victim specifically identified defendant as having shot him. This testimony was sufficient to allow the jury to reject the testimony of the alibi witnesses to the extent that it indicated defendant was elsewhere at the time of the shooting because the credibility of identification testimony is a question for the factfinder. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Thus, we conclude that there was sufficient evidence that defendant committed an assault with intent to murder to support his convictions.

III. Prosecutorial Misconduct

Defendant also argues that there were multiple instances of improper remarks by the prosecutor during closing and rebuttal argument. These remarks were not objected to below and, thus, cannot provide a basis for relief unless they constituted plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We conclude that defendant has not established any basis for relief.

First, defendant claims that statements by the prosecutor in closing argument indicating that he had a motive for trying to kill the victim based on the victim's testimony in Talley's trial for the death of Rice were improper. However, "a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case." *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The victim testified that there were many times he saw friends of Rice with defendant. Further, on cross-examination by the prosecutor, defendant's mother testified that she knew Rice through defendant and her other children and that Rice "was good friend [sic]. He called me mom." Moreover, the victim testified that he was shot by defendant on the same day that Talley was acquitted of the murder charge. Accordingly, it was proper argument based on reasonable inferences from the evidence that defendant shot the victim based on the motive of obtaining revenge for the victim's testimony that may have helped Talley be acquitted of murder in Rice's death.

Defendant indicates that it was improper for the prosecutor to suggest that the defense alibi witnesses had a special reason to lie based on their familial relationship or friendship with defendant. However, a prosecutor may properly comment on the credibility of a witness based on the evidence and inferences to be drawn from it. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). It was proper argument from the evidence for the prosecutor to raise the relationship of the alibi witnesses to defendant as a consideration weighing against their credibility.

Defendant excises portions of the following remarks by the prosecutor in rebuttal argument and argues that they constituted an impermissible argument that defense counsel would use any device to try to obtain an acquittal while the prosecutorial role is consistent with truth and justice:

Now, some arguments may be made to try to appeal to emotion or fear or things like that. But the question is what does the evidence show you. And you were told: That's my burden, to bring forth evidence that shows you the elements beyond a doubt based on reason and common sense.

Contrary to defendant's argument, considered in their entirety, these remarks were not directed at the general roles of a prosecutor as opposed to criminal defense counsel. Rather, they were focused on directing the jury's attention to the evidence and the prosecution's burden of proof. Further, "[a] prosecutor's comments must be considered in light of defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). During closing argument, defense counsel had stated "if you are able to convict that man on that kind of evidence, none of us are safe, none of us." The prosecutor's remarks were reasonably responsive to this argument in urging the jury not to decide the case based on fear, but on the evidence. Accordingly, we conclude that the remarks in question were proper.

Finally, defendant argues that the prosecutor mischaracterized the evidence by stating in rebuttal argument that (1) she had asked the victim if Talley's trial involved a self-defense claim and (2) that defendant knew the victim. While, as the prosecution acknowledges in its brief, the prosecutor never actually asked the victim if Talley's trial involved a self-defense claim, the important point regarding defendant's alleged motive to kill the victim was simply that he testified as a witness for Talley at the trial in which he was acquitted of murder in Rice's death. The exact nature of Talley's defense was inconsequential to the thrust of the prosecutor's argument. Thus, we conclude that defendant is not entitled to relief in this regard because he has not shown plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*. We further conclude that there was no plain error in the prosecutor's statement indicating that defendant knew the victim. The victim testified that, after defendant asked "who is George" and no one responded, he looked at the victim and then pulled out a gun and pointed it at the victim's head. From this testimony, it is at least arguable that defendant recognized the victim before pulling out the gun and, thus, there was no plain error in the prosecutor indicating that defendant knew the victim.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder